

# North Carolina Commission on the Fair Treatment of Student- Athletes

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Paul H Haagen, JD, PhD

Professor of Law

Co-Director, Center for Sports Law and Policy

Duke University School of Law

# Regulation of Intercollegiate Sport: Background

- Traditionally and Predominantly Private Ordering
- Regulating the Regulators
  - Threat of public regulation
  - Public oversight and regulation
  - Judicial review

# Current Legal Environment

- Significant Legal Challenges to the Current Regulatory Structure
- Legislative Investigations
- Legislative Initiatives

# Challenges to Limits on Athlete Compensation

- Should Student-Athletes Be Paid?
  - Form of the question is misleading – Student Athletes Can and Are Being Paid
  - Real issue: Who decides how much, and on what principle?
- Anti-trust Analysis
  - The NCAA is subject to the Antitrust Laws
  - Because of the peculiar nature of sports, agreements among competitors to limit competition are analyzed under the Rule of Reason
  - If the agreements are more “pro-competitive” than “anti-competitive”, they do not violate the law, if they are deemed the least restrictive means necessary
  - Rule of Reason analysis is fact based and should consider only economic effects, and not broader social goals

# Antitrust Challenges and Defenses

- Limitations on the Marketing of Names and Likenesses
- Limitations on Scholarship Amounts
- All NCAA regulations on Compensation
- Defense:
  - The line of separation between intercollegiate and professional sports is critical to support a separate market for intercollegiate sports competition, and to permit intercollegiate sports to compete with other forms of entertainment
  - Defense is fact based and dependent on proof of a critical connection between the limitations (restraints on competition) and the pro-competitive maintenance of a separate market

# Restraints

- Nature and Amount of Compensation
- Access to Representation

# Federal Labor Law: Are Student-Athletes Employees?

- Federal Labor Law grants employees of private employees the right to organize, and, if organized, to bargain with their employers over wages, hours and the conditions of work
- Northwestern football players sought to organize
- The Regional Office of the NLRB held that the players were employees within the meaning of the NLRA
- The NLRB declined to take jurisdiction of the case at this time, but took no position on the underlying legal question
- The General Counsel of the NLRB has taken the position that Student-Athletes are employees within the meaning of the NLRA
- Possible Implications for the Organization of Intercollegiate Athletics

# State Protections of Student Athletes

- Reporting Requirements
- Safety and Health
- Academic Protections
- Obligations of Institutions to Provide Educational or Health Care Benefits Beyond those Provided for in NCAA Rules
  - Potentially problematic unless the obligations extended to “all students”
- Due Process Protections Related to Eligibility to Participate and Compete
  - Supreme Court has held that NCAA is not a state actor and not subject to the due process constraints of the 5<sup>th</sup> and 14<sup>th</sup> Amendments (NCAA v Tarkanian)
  - Ninth Circuit has held that a state statute imposing due process requirements on the NCAA violated the Commerce Clause (NCAA v. Miller)